GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

August 26, 2009

The Honorable John D. Rockefeller, IV
Chairman, Committee on Commerce,
Science and Transportation
United States Senate
Washington, D.C. 20510-6125

Dear Mr. Chairman:

This letter provides the views of the Department of Commerce on S. 850, the "Shark Conservation Act of 2009." The Department, along with its federal agency partners, has made great strides in recent years toward our goal of strengthening domestic and international conservation and management of sharks. We support the intentions underlying this legislation insofar as they are consistent with this goal.

The legislation would amend Section 610(a) of the *High Seas Driftnet Fishing Moratorium Protection Act* (16 U.S.C. § 1826k(a)) to require the Secretary of Commerce to identify nations whose fishing vessels are, or have been, engaged in fishing practices that target or incidentally catch sharks, if the nation has not adopted a regulatory program to provide for the conservation of sharks that is comparable to that of the United States, taking into account different situations. If identified nations do not receive a positive certification from the Secretary of Commerce for taking appropriate corrective action, they could face, among other measures, prohibitions on the importation of certain fisheries products into the United States.

S. 850 would also amend Section 307(1) of the *Magnuson-Stevens Fishery Conservation and Management Act* (16 U.S.C. § 1857(1)) to prohibit: (1) the removal of shark fins at sea; (2) the custody, control, or possession of any shark fin aboard a fishing vessel unless it is naturally attached to the corresponding carcass; and (3) the landing or transfer of any shark fin or carcass from one vessel to another vessel at sea, as well as the receipt of a fin or carcass in such a transfer, without the fins naturally attached to the corresponding carcass. The legislation also retains the rebuttable presumption that illegal finning has occurred whenever shark fins are landed from a fishing vessel and the weight of the fins, after landing, exceeds five percent of the weight of the carcasses. The rebuttable presumption is a critical tool for dockside enforcement when enforcement officers are unable to monitor an entire offload, and enhances shark conservation efforts by allowing the National Oceanic and Atmospheric Administration to utilize dealer landing records to detect potential shark finning violations post-landing for subsequent follow-up investigation. The legislation also provides a rebuttable presumption that an illegal transfer has occurred when fins are found on board a vessel, other than a fishing vessel,

that are not naturally attached to the corresponding carcass. This rebuttable presumption is also critical for at-sea enforcement of the shark finning ban. While those in the legal shark trade could easily document the legitimacy of fins onboard, this provision is critical to addressing the illegal shark fin market because it obviates the requirement that would otherwise exist that the vessel be caught in the act of transferring fins illegally.

The Department and its federal agency partners support the proposed amendments to the *Magnuson-Stevens Fishery Conservation and Management Act* contained in Section 3 of S. 850, which would explicitly prohibit transfer or receipt at sea of shark fins that are not naturally attached to their corresponding carcasses. The proposed amendments help to clarify the scope of the government's enforcement authority, and effectively reverses the Ninth Circuit's decision in U.S. v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976 (9th Cir. 2008). In that case, a U.S. vessel was caught engaged in the at-sea transfer of thousands of pounds of fins, purchased from fishing boats, with the intention of landing them in Guatemala for shipment to Hong Kong. The vessel was charged with violating the Shark Finning Prohibition Act under the broad definition of "fishing vessel" contained in the *Magnuson-Stevens Fishery Conservation and Management Act*. The District Court found for the government, but the 9th Circuit reversed that ruling holding, in relevant part, that the vessel was not a "fishing vessel" under the *Act*. Transshipment of fins at sea presents a significant threat to the sustainability of shark stocks and the new prohibitions contained in S. 850 squarely address this activity.

The Department believes the requirement contained in S. 850 that prohibits the removal of shark fins at sea and requires all sharks to be landed with the fins naturally attached would greatly increase the at-sea enforceability of the finning ban. Because identifying sharks can be difficult without the carcasses attached to the fins, this change would also improve the ability of fishermen, dealers and enforcement personnel to identify sharks at the species-level, thereby improving the accuracy of reporting and enhancing our ability to enforce prohibitions on the harvest of protected sharks. In 2008, the Department took action in the Atlantic Ocean, including the Gulf of Mexico and the Caribbean, that now requires that all shark fins, including the tail, must remain naturally attached to the shark carcass until that carcass has been offloaded. This new requirement seems to be promoting improved compliance with the finning ban.

The Department supports the amendment of the rebuttable presumption from the *Magnuson-Stevens Fishery Conservation and Management Act* contained in Section 3 of S. 850. This amended rebuttable presumption will significantly enhance dockside and at-sea enforcement by enabling us to detect a violation even when enforcement personnel are not present to observe the entire offload or transfer. Although the Department supports the intent of this amendment, the Department recommends clarifying the language in Section 3(2) by replacing the "and" after "such fin was transferred in violation of subparagraph (P)(iii)" with ", or", so that Section 3(2) would read as follows:

> "by striking the matter following subparagraph (R) and inserting the following: 'For purposes of subparagraph (P), there shall be a rebuttable presumption that if any shark fin (including the tail) is found aboard a vessel, other than a fishing

vessel, without being naturally attached to the corresponding carcass, such fin was transferred in violation of subparagraph (P)(iii), or that if, after landing, the total weight of shark fins (including the tail) landed from any vessel exceeds five percent of the total weight of shark carcasses landed, such fins were taken, held, or landed in violation of subparagraph (P).'."

The Department recommends including a definition of "naturally attached" to mean shark fins that remain attached to the shark carcass via at least some portion of uncut skin. The addition of a definition of "naturally attached" would both clarify the intent of the amendment and would also allow fishermen to process and transport the shark in a manner that maintains the quality of the meat.

However, the Department does not support the amendments to the *High Seas Driftnet Fishing Moratorium Protection Act* contained in Section 2 of S. 850. First, the amendments imply there is a single identifiable standard of shark conservation and management in the United States, and fail to recognize the differences between state and federal approaches to shark management. Thus, as drafted, S. 850 could pose implementation challenges and add to the litigation risks of defending the United States in the face of potential challenges alleging that the United States failed to properly identify nations engaged in shark fishing that had not adopted a regulatory conservation program.

Second, the newly proposed requirements to the *High Seas Driftnet Fishing Moratorium Protection Act* in S. 850 to address shark harvest and bycatch represent sometimes duplicative additions to the existing requirements of that Act. For example, amendments to the *High Seas Driftnet Fishing Moratorium Protection Act*, enacted as part of the *Magnuson-Stevens Fishery Conservation and Management Reauthorization Act*, already require a biennial report to Congress that identifies nations whose vessels have been engaged in illegal, unreported, or unregulated fishing or bycatch of protected living marine resources, including sharks.

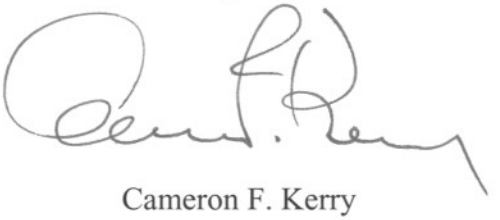
Third, the amendments to the *High Seas Driftnet Fishing Moratorium Protection Act* contained in S. 850 appear to be broader in geographic scope, relative to the current provisions in that Act, and may extend into areas within the jurisdiction of other countries. The Department would not support such a provision insofar as it could require the United States to take action against other nations for activities within their own waters.

Finally, the United States succeeded in inserting strong new language regarding shark conservation and management into the 2007 United Nations General Assembly Resolution A/RES/62/177. This language calls on states and regional fisheries management organizations to, among other things: ensure the long-term conservation, management, and sustainable use of sharks; prevent further declines of vulnerable or threatened sharks; and take immediate and concerted action to improve the implementation of, and compliance with, existing international and national shark conservation measures, including those prohibiting the practice of shark finning. The

Department is committed to carrying this Resolution's call for action to the regional fisheries management organizations of which the United States is a member, with the goal of adopting legally binding conservation measures where appropriate. The Department has determined that this multilateral approach will be a more effective means of improving nations' efforts to conserve and manage sharks than the amendments proposed in S. 850 to the identification and certification process authorized in the *High Seas Driftnet Moratorium Protection Act.*

The Department appreciates the opportunity to present these views on S. 850. The Office of Management and Budget has advised that there is no objection to the transmittal of these views from the standpoint of the Administration's program.

Sincerely,



Cameron F. Kerry

cc: The Honorable Kay Bailey Hutchison
Ranking Member

The Honorable Maria Cantwell
Chair, Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard

The Honorable Olympia J. Snowe
Ranking Member, Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard